IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Opinions Below

The opinion of the District Court (R. 432), the dissenting opinion of Judge Bright (R. 441), and the *per curiam* opinion of the District Court (R. 449), are not yet reported.

Jurisdiction

The decree of the District Court was entered on February 21, 1942 (R. 446). The petition for direct appeal to this Court was filed February 27, 1942 (R. 451), and was allowed on March 2, 1942 (R. 453).

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended (28 U. S. C., Section 345), providing for the direct review by the Supreme Court of a final judgment or decree of a District Court of three judges under the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Sections 41 (28), 43 through 48, inclusive), as extended by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Section 402(a)). This Court noted probable jurisdiction on March 16, 1942.

Question Presented

The question presented is whether the statutory three-judge District Court has jurisdiction to review the Order of the Federal Communications Commission, hereinafter described, under Section 402(a) of the Communications Act of 1934.

Statutes Involved

The statutes pertinent to this appeal are annexed to this brief as Appendix A. They are:

The Urgent Deficiencies Act (38 Stat. 219, 220; 28 U. S. C., Sections 41 (28), 43 through 48, inclusive).

The Communications Act of 1934, Section 402, and Sections 4(i), 303(f) and (i), 307(a), 309(a) and (b), 312(a) and 502 (48 Stat. 1093, 1064, 1068, 1082, 1083, 1085, 1086, 1100; 47 U. S. C., Sections 402, 154(i), 303(f) and (i), 307(a), 309(a) and (b), 312(a) and 502); also Section 303(r) (50 Stat. 191; 47 U. S. C., Section 303(r)).

Statement

This suit was brought by National Broadcasting Company, Inc. (hereinafter called NBC), the pioneer nationwide network organization engaged in radio broadcasting, and by Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, two licensees of radio broadcasting stations, against the United States and the Federal Communications Commission. The purpose of the suit is to set aside an Order of the Commission (in so far as it purported to become effective on November 15, 1941), on the ground that the Commission lacks power to make the Order. The Order was entered May 2, 1941, and amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." In both instances two Commissioners dissented. The original Order and the amendment are annexed to this brief as Appendix B for the convenience of the Court.

The complaint (R. 1) was filed in the United States District Court for the Southern District of New York on October 30, 1941 and was dismissed for lack of jurisdiction over the subject matter on February 21, 1942 (R. 446).

The portions of the Order sought to be enjoined are directed at contracts between network organizations (such as NBC) and independently owned and operated radio broadcasting stations (such as the co-appellants), pursuant to which network broadcasting is conducted. The effect of the Order upon such contracts is material to a consideration of the jurisdiction of the District Court and it is necessary at the outset to give a brief description of the industry.

Chain or Network Broadcasting

Radio broadcasting in other countries is operated by the government and is supported by taxation. In this country radio broadcasting is not a governmental enterprise and is supported wholly by advertising (R. 41, 433). All stations are, however, operated under license from the Federal Communications Commission.

Radio broadcasting in the United States is conducted by approximately 800 standard broadcast stations scattered throughout the nation. Most stations maintain a continuous schedule of programs throughout the broadcasting day, which generally covers 16 to 18 hours. These programs may be commercial programs, paid for or sponsored by advertisers, or they may be what are called "sustaining" or non-sponsored programs which are used to fill time not utilized by advertisers and to create good-will. Sustaining programs are, of course, like everything else in radio broadcasting, paid for out of advertising revenues which are the sole source of broadcasting income (R. 168-170, 227-228).

Radio broadcasting is pre-eminently a national medium of expression and a large part of the advertising revenue available to radio comes from national network advertising. The factor giving to radio broadcasting its unique usefulness and functions, enabling it to subsist in stiff competition with a variety of competing media, is its ability to cover the entire nation at the same instant. This simultaneous nation-wide circulation is insisted upon by national radio advertisers (R. 7-8, 40, 229-230).

The availability of an instantaneous means of simultaneous national communication makes radio an incalculable asset both in peace and in war. It is a vehicle of expression

unequalled even by the press and is a potent instrument for the attainment of national unity.

All stations are of limited range and power and no single station has sufficient coverage to satisfy the needs of national advertisers or of the nation for simultaneous nation-wide circulation. Such circulation can only be obtained from the cooperation of many and far-flung separate radio stations. This is attained in the United States through a widespread system of contracts (known as "affiliation contracts") between a network organization and independent standard broadcast stations (known as "affiliates") (R. 5-8, 434).

A network organization is essentially a program production and distribution agency. It is the central agency which enables a large number of individual stations to furnish a national service although it operates relatively few stations itself. For example, the NBC "Red Network" as of June 1, 1941 was composed of 76 stations, of which only 6 were operated by NBC (R. 8 and 26A). Individual stations operated by network organizations are, of course, licensed by the Federal Communications Commission but the Act does not provide for the licensing of network organizations, as such.*

The studios of a network organization are connected with its affiliated stations by special telephone lines over which a particular commercial or sustaining program is distributed to the individual stations from which the pro-

* There are four national network organizations: National Broadcasting Company, Inc., Blue Network Company, Inc. (both companies being wholly-owned by Radio Corporation of America), Columbia Broadcasting System, Inc., and Mutual Broadcasting System, Inc. Blue Network Company, Inc. was organized after the commencement of this suit to operate the "Blue Network" formerly operated by National Broadcasting Company, Inc. In addition there are numerous regional networks (R. 139).

gram is then simultaneously broadcast. The affiliation contracts set forth the terms upon which these programs are distributed. By means of affiliation contracts, the individual stations are so organized as to make available, both commercially and for public service, a method of instantaneous and simultaneous nation-wide communication. Through the same means these stations are enabled to obtain commercial and sustaining programs of national significance (R. 5-8).

The system of affiliation contracts is the essence of chain or network broadcasting as presently conducted. It represents a careful and delicate balance between the autonomy of the independent local stations in rendering both a local and a national service and the dependence of the national service upon simultaneous nation-wide circulation. The terms of NBC's affiliation contracts are described in the complaint (R. 7) and a form of contract is annexed to the complaint as Exhibit A (R. 18).

The typical affiliation contract provides that NBC will furnish the individual station with a full schedule of sustaining programs and pay the cost of the special telephone lines, and that the proceeds from the sale of network time will be apportioned between NBC and the station. The individual station, on the other hand, grants to NBC an option to sell certain specified periods of the affiliate's time, totaling 8½ out of 16 to 18 hours per day, exercisable on 28 days' notice. This clause, known as the option time clause, makes possible simultaneous nation-wide network circulation and by it a purchaser of time on the network can be assured of full network circulation on 28 days' notice. Appellants regard option time as the *sine qua non* of network broadcasting. It is the most bitterly contested substantive issue in this case.

Each affiliated station is separately engaged in scheduling its daily complement of programs. Each network organization is at the same time engaged in scheduling a daily series of network programs to be broadcast by the affiliated stations. In the absence of some provision enabling the network to arrange for guaranteed periods of time on all affiliates, it is inevitable that conflicts in time commitments as between the network and one or more stations will arise.

The national advertiser must be assured of simultaneous national circulation. This is necessary to attract an advertiser to radio in the first instance and also to induce him to embark upon a particular advertising campaign. Without the continuing certainty that such circulation will be available when wanted, neither network nor advertiser could afford to enter into commitments for the expensive and varied talent necessary to produce network programs (R. 159, 168-170).*

The failure of a single station located in a market indispensable to an advertiser, or the failure of a sufficient number of less important stations, to accept a particular program, would cause the advertiser to withdraw, would defeat the desire of all of the other affiliated stations to carry the program, and would deprive the public of a nation-wide network program (R. 159, 168-170, 235-236).

The very existence of nation-wide network broadcasting is, therefore, dependent upon the ability of a network to operate as a cohesive unit, and that ability is based upon the affiliation contracts and upon option time in particular (R. 6-8). It is alleged in the complaint (R. 16) that nation-

*Were the network organization remitted to inquiring of each affiliated station as to the availability of a particular hour, half, or quarter hour, reporting to the advertiser what stations are available, and re-inquiring again of the stations as to the continued availability of time, it could never guarantee coverage to the advertiser.

wide network broadcasting cannot feasibly be conducted without affiliation contracts containing clauses for the optioning of time of independent standard broadcast stations for nation-wide broadcasting. As stated by the dissenting Commissioners, Craven and Case (R. 152):

> "It is axiomatic that unlimited availability of the few existing radio facilities, and efficient national program distribution cannot both be attained at the same time."

The Commission's Order

On March 18, 1938 the Commission on its own motion issued its order No. 37 (R. 131), entitled "Order Instituting Chain Broadcasting Investigation", to gather sufficient information to determine what special regulations applicable to radio stations engaged in chain broadcasting should be promulgated by it under the authority of Section 303(i) of the Communications Act of 1934. The matters specified for investigation were industry-broad in scope and covered all aspects of nation-wide network broadcasting (R. 131).

Hearings were held between November 14, 1938 and May 19, 1939. A committee consisting of three Commissioners issued a report on June 12, 1940, and on November 28, 1940 the Commission announced its procedure for oral argument on this committee report (R. 137). The announcement contained certain proposed chain broadcasting regulations (R. 137). On December 2 and 3, 1940 oral argument was held before the Commission on the committee report and the proposed regulations (R. 37-38). Briefs were filed by NBC and others both on the substance of the proposed regulations and on the jurisdiction of the Commission (R. 38, 116, 127).

On May 2, 1941 the Commission issued its Report on Chain Broadcasting (R. 29) together with its original Order

(R. 127). The Order promulgated eight regulations dealing with substantially every important aspect of network broadcasting. Two of the regulations, 3.106 and 3.107, sought to effect a forced disposition by NBC of either its "Red" or "Blue" network and the forced disposition of certain stations licensed directly to NBC and other network organizations. It is not necessary to discuss the substance of these two regulations as they have been largely postponed in effect. The remaining six regulations, 3.101-3.105 and 3.108, sought to effect a drastic revision of the contracts of affiliation between the network organizations and independent standard broadcast stations.* For example, regulation 3.104 wholly prohibited option time.

Two of the seven Commissioners dissented (R. 151) on the grounds that the Commission was without power to adopt the regulations and that some of the contract provisions prohibited by the regulations, including option time, were essential to network broadcasting (R. 159).

Effective Dates and Amendment of the Commission's Order

The Order provided that the Commission would issue no license to a standard broadcast station having relationships prohibited by the Order and also provided that it was effective immediately,

> "Provided, that, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order; Provided further, That the effective date of Regulation 3.106 may be extended from time to time with

* Except when otherwise indicated by the context, references to the Order in this brief are to these six regulations only.

respect to any station *in order to permit the orderly disposition of properties.*"* (R. 128)

Negotiations between the radio broadcasting industry and the Commission resulted in five postponements of effective dates of various parts of the Order, those portions of the Order dealing with existing affiliation contracts finally being made effective on November 15, 1941 (R. 1-2, 201-203).

Extensive hearings upon the regulations were held before the Senate Committee on Interstate Commerce from June 2 to June 20, 1941 (R. 201).** During July and August following these hearings a series of conferences was held between the industry and the Commission (R. 202). On September 12, 1941 there was a rehearing in connection with a petition of Mutual Broadcasting System, Inc., requesting certain amendments of the regulations (R. 202).

On October 11, 1941 the Commission issued its Supplemental Report on Chain Broadcasting (R. 201) together with its Order amending the original Order in several respects (R. 213). One amendment was with respect to regulation 3.104 which had previously prohibited all option time. As amended, this regulation continued to prohibit a true option in any part of a station's time and invented something the Commission called a "non-exclusive option". It is of the essence of an option that it be good against the world but this so-called "non-exclusive option" is not good against any network organization, whether regional or national. Even in so far as it is exercisable against others it can only be exercised for certain portions of a day and upon not less than 56 days' notice. This amendment, while intricate and confusing, has precisely the same disastrous effect as complete prohibition.

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* All emphasis in this brief is supplied.

** These hearings are reported as *Hearings before Committee on Interstate Commerce on S. Res. 113, 77th Cong. 1st Sess. (1941).*

Two Commissioners again dissented on the ground that the Commission had no jurisdiction and on the ground that the option time regulation was as bad as before (R. 215).

Damaging Effect of the Commission's Order

The Commission's Order caused immediate and drastic injury to the nation-wide broadcasting enterprise carried on by NBC and its affiliated stations, including the two co-appellants. Between May 2, 1941 when the original Order was promulgated and October 30, 1941, the date of the filing of the complaint herein, 48 stations affiliated with NBC served notice of the abrogation of their contracts of affiliation (R. 16). Copies of representative letters from affiliated stations abrogating their contracts *as of the effective date of the regulations expressed in the Order* are attached to the affidavit of Frank E. Mullen (R. 405-419), submitted in opposition to defendants' motion to dismiss.* In addition between May 2, 1941, and November 12, 1941, when the Order was suspended by stipulation of the parties and order of the District Court, NBC and independent stations were unable to renew contracts containing the provisions desired, or to enter into new contracts, although they otherwise would have renewed or entered into such contracts (R. 16).

The Suit

As a result of these drastic and incisive effects of the Order of May 2, 1941 and of the Order as amended October

* The court below fell into plain error when it stated "* * * a number of 'affiliates' have declared that they will be obliged to break their contracts *when their licenses are renewed* * * *" (R. 435). This is an important mistake of fact. The record in this case shows that affiliates have cancelled and threatened to cancel their contracts *as of the effective date of the regulations as expressed in the Order* (R. 405-419).

11, 1941, appellants brought suit in the District Court for the Southern District of New York against the United States and the Federal Communications Commission, under Section 402(a) of the Communications Act of 1934, to set aside the Order, as amended, in so far as it purported to become effective on November 15, 1941, on the ground that the Order was beyond the power of the Commission (R. 14) and that appellants were irreparably injured thereby (R. 16). The complaint together with a motion for preliminary injunction was filed on October 30, 1941. On the same day Columbia Broadcasting System, Inc., also brought suit in the same court to enjoin certain portions of the Order. The two cases were not consolidated but were heard together in the court below and the Columbia suit is the companion case in this Court, No. 1026. Mutual Broadcasting System, Inc., being peculiarly advantaged by the Order, intervened in both cases and supported the Commission.

The day after appellants filed their complaint the Commission adopted a "minute" (R. 379) proposing that if a station wished to contest the validity of the Order or the reasonableness of its application to such station, the station's license would be set for hearing and it would receive a temporary license pending such hearing and any appeal therefrom. The "minute" stated that if a station failed in such appeal it would nevertheless receive a license upon compliance with the Order. The "minute" also stated that the adoption of such procedure was without prejudice to the rights of any person to petition the Commission for a modification or stay of the Order.

By stipulation of the parties and order of the District Court dated November 12, 1941, the Commission suspended its Order (R. 430) and it was informally agreed by letter between the parties that this suspension should be effective

until 10 days after service of an order of the District Court disposing of appellants' motion for a temporary injunction.

The United States and the Commission filed motions to dismiss the complaint or in the alternative for summary judgment (R. 375). The District Court upheld appellees' contention that it was without jurisdiction over the subject matter of the action (R. 432) and dismissed the complaint (R. 446), Judge Bright dissenting (R. 441).

The United States and the Commission insisted and the Court held that there was jurisdiction in the Court of Appeals for the District of Columbia to review the Order under Section 402(b) of the Act on appeal from a licensing proceeding before the Commission (R. 436-438). In view of this determination, counsel for appellants sought an agreement from the Commission whereby representative license renewal proceedings would be instituted to review the Order in that manner, provided the Commission would stay enforcement of the Order pending determination of its validity in such proceedings. This the Commission refused to do.

Thereupon, appellants moved the District Court for a stay of the Order pending this appeal (R. 447). On March 2, 1942, the District Court entered an order restraining the Federal Communications Commission from enforcing its Order until May 1, 1942, or the argument of this appeal, whichever might be earlier (R. 451).

In granting this temporary stay the Court below found:

> "II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity" (R. 450).

and stated in its opinion:

> "The Commission is of course right in saying that we have decided that the plaintiffs have adequate

protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. *If so, the plaintiffs will not be adequately protected, and, indeed, they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding"* (R. 449).

Specification of Errors

The District Court erred:

1. In dismissing plaintiffs' complaint upon the ground that the Court had no jurisdiction over the subject matter of the case.

2. In failing to find, as it should have done, that it had jurisdiction to issue the injunction prayed for in the complaint.

Summary of Argument

There is no question on this appeal as to whether the Commission's action is reviewable by any court, since the Commission concedes, and the District Court held, that such action is subject to review under Section 402 of the Act. The sole question is whether the proper procedure for review of the Commission's Order is that provided by Section 402(a) of the Act, as contended by appellants, or that provided by Section 402(b), as contended by appellees.

Section 402(a) provides that suit may be brought as provided in the Urgent Deficiencies Act to enjoin, set aside, annul or suspend "any order of the Commission under this

Act", with 5 specific exceptions covered by Section 402(b). Section 402(b) provides a different procedure, by appeal to the Court of Appeals for the District of Columbia, to be followed when the Commission's order is one of the five types specifically excepted from Section 402(a), each of these five types being orders granting or denying applications for licenses or for modifications thereof.

The Order of the Commission here in question is an "order" promulgating special regulations applicable to all radio stations engaged in chain broadcasting, adopted after an extended hearing instituted by the Commission and amended after rehearing. It has caused affiliates of NBC to regard their present affiliation contracts as illegal and to cancel such contracts as of the effective date of the Order, without regard to the expiration dates of their licenses.

The Order appears to come squarely within the provisions of Section 402(a) as an "order" promulgating regulations. It neither grants nor denies a license of any kind and it has no recognizable relationship to any of the five specific types of orders reviewable under Section 402(b) of the Act.

Although an exercise of the rule-making power by the Federal Communications Commission such as the present order is normally reviewed under Section 402(a) (*American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232 (1936)), and similar exercises of power by the Interstate Commerce Commission are normally reviewed under the Urgent Deficiencies Act (*The Assigned Car Cases*, 274 U. S. 564 (1927); *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454 (1935)), the Commission here seeks to avoid this normal course of review. It argues that because of the wording used in the regulations, "no license shall be granted," the Court should hold that the Order is not what it purports to be.

This argument of the Commission is based upon pure verbalism. Every substantive characteristic of the Order also shows that it is an "order" reviewable under Section 402(a) of the Act. It was formulated and made as an order promulgating definitive regulations which the Commission meant to be complied with and which are enforceable apart from licensing proceedings. As of its effective date it has caused contract cancellations and has forestalled new contracts. The mere fact that the regulations are negative in form and are directed in terms to the Commission does not affect reviewability under Section 402(a). (*Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125 (1939); *Powell* v. *United States*, 300 U. S. 276 (1937).)

The sole remaining question is whether the "minute" adopted by the Commission after the commencement of the present suit affords a reasonable basis for deciding that the possibility of reviewing the Order under Section 402(b) displaces the normal procedure for review under Section 402(a).

This question must be answered in the negative. The "minute" in no way operates to change the form or the substance of the Order, but recognizes the regulations therein contained as definitive enforceable regulations. Although the "minute" indicates that the Commission desires to have the regulations reviewed under Section 402(b), the inappropriateness of that procedure (which was designed for the review of individual licensing proceedings) as a means of reviewing regulations of general applicability is not subject to serious question. The Commission is unable, moreover, to point to any overriding reason of policy which requires that the present issues be reserved for decision on an appeal under Section 402(b).

The "minute" gives immunity from the Order only to individual litigants under special circumstances and leaves the Order otherwise fully effective. Instead of according blanket protection such as was given in *Landis, et al.* v. *North American Co.*, 299 U. S. 248 (1936), the Commission has expressly refused to stay enforcement of its Order pending its review in a test case, indicating that it desires something more than an appropriate procedure for review. There can be no doubt but that the Commission wants the immediate obedience to its regulations which has resulted and will continue to result from the fact that such regulations are, both in form and in substance, definitive, enforceable regulations.

These circumstances permit of only one conclusion. The Commission's Order is reviewable in this action under Section 402(a) and the District Court was in error in dismissing appellants' complaint on the ground that the Court had no jurisdiction over the subject matter of the case.

ARGUMENT

I

The Commission's Order is, on its face, an "order" promulgating regulations which is a proper subject for review under Section 402(a) of the Act.

There is no question on this appeal as to the jurisdiction of the Supreme Court to hear and determine this appeal under Section 238 of the Judicial Code (28 U. S. C., Section 345). The only issue relates to the jurisdiction of the specially constituted three-judge District Court over the subject matter of this action.

This issue does not involve the question whether the action which the Commission has taken is subject to review by any court. It is freely conceded by the Commission that its action is subject to judicial review under Section 402 of the Communications Act of 1934 and the District Court so held. The only question here at issue is whether the correct procedure for the review of this action by the Commission is that prescribed by Section 402(a), as we contend, or that prescribed by Section 402(b), as urged by the Commission and held by the District Court. Hence this case is unlike cases such as *Perkins, et al.* v. *Lukens Steel Co., et al.*, 310 U. S. 113 (1940), wherein the controlling question was whether any court could pass upon administrative action of the character there involved.

The question for decision in this case is a narrow one which arises only because Congress has provided two different procedures for bringing before the courts the legality of reviewable action taken by the Commission. This Court is asked to decide whether the procedure provided by Section 402(a) of the Communications Act is a proper procedure for reviewing the Order of the Commission here in question.

The Statute

The availability of one or the other of the two methods of review established by Section 402 depends upon the character of the action taken by the Commission. Section 402(a), under which the present action is brought, provides that suits may be instituted in the manner provided by the Urgent Deficiencies Act of October 22, 1913 to enjoin, set aside, annul or suspend "any order of the Commission under this Act", with five specific exceptions.

Section 402(b) provides a different procedure to be followed when the Commission's order is one of the five

types specifically excepted from the provisions of Section 402(a), *i. e.*, orders (1) granting or denying applications for radio station construction permits, (2) granting or denying applications for radio station licenses, (3) granting or denying applications for modification of an existing radio station license, (4) granting or denying applications for renewal of an existing radio station license, or (5) suspending a radio operator's license. In these five cases, and only in these five cases, judicial review is to be obtained by an appeal to the Court of Appeals of the District of Columbia, with ultimate resort to the Supreme Court on writ of *certiorari*.

The reason for this differentiation has recently been stated by this Court in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 10 U. S. Law Week 4322 (April 6, 1942), wherein it was said with reference to these two sections, at page 4324:

> "* * * But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under §402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under §402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in

> situations where the Commission's order arose out of a proceeding not instituted by the licensee."

That the reviewability of an order under Section 402(a), as distinguished from 402(b), does not depend upon whether the order relates to an exercise of the licensing power is also shown by the fact that orders relating to revocation and transfer of licenses are admittedly reviewable under Section 402(a). See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission, supra,* at page 4323; *cf. Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.,* 311 U. S. 132 (1940).

The District Court's misunderstanding of the line of demarcation between Section 402(a) and Section 402(b) is evident from the following statement from the majority opinion:

> "• • • Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a 'station' applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word 'order' in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such 'orders.'" (R. 437)

The Order

The Order of the Commission here in question is an "order" adopting special regulations applicable to all radio stations engaged in chain broadcasting. It was made after extended hearings, argument on tentative regulations and the adoption of the Commission's Report on Chain Broadcasting. This entire proceeding was initiated by the Commission on its own motion.

The enacting clause of the Order of May 2, 1941 (omitted in the text of the Order annexed to the opinion of the lower court) reads as follows:

> "WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity';
>
> "WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission';
>
> "WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;
>
> "WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and
>
> "WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached:

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:"

There follow eight particularized regulations of general application to all standard broadcast stations. Six of the regulations were directed against certain clauses in the network affiliation contracts. The Order distinguished between future and existing contracts and purported to become effective immediately with respect to the making of new affiliation contracts or the renewal of expiring ones. With respect to existing contracts, the regulations were ultimately made effective on November 15, 1941. The effective date of the other two regulations, dealing with the ownership and operation of networks and particular stations, was postponed "in order to permit the orderly disposition of properties."

When the Order is viewed in the light of the statutory scheme of review created by Section 402 of the Act, it appears to come squarely within the provisions of Section 402(a) and to have no recognizable relation to any of the orders reviewable in the manner provided by Section 402(b). It is beyond question that the Order neither grants nor denies any license of any kind, nor does it modify any license.

Adoption and Effect of the Order

The procedure leading to the adoption of the Order and the damage it has caused only serve to confirm this conclusion. This procedure is outlined in full in the Commission's Report (R. 37) and in the affidavit of Telford Taylor, Esq., submitted in support of the motion to dismiss the complaint (R. 376). Everything that was done was directed at the formulation of "special regulations" of general signifi-

cance to the industry, applicable on and after a certain date to all radio stations engaged in chain broadcasting.

The damaging effect of the Order is alleged in the complaint (R. 16) and is supported by the affidavit of Frank E. Mullen submitted in opposition to the motion to dismiss (R. 405). The making of the Order had the direct effect of causing stations to refrain from entering into standard affiliation contracts with NBC when they would otherwise have done so.* Because of the Order a substantial number of stations having existing contracts of affiliation with NBC served notice of abrogation of their respective contracts *as of the effective date of the regulations as expressed in the Order.*

The Commission Seeks to Avoid Normal Review

An exercise of the rule-making power by the Federal Communications Commission, such as the present Order, is normally reviewed under Section 402(a) (*American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232 (1936)), and similar exercises of power by the Interstate Commerce Commission are normally reviewed under the Urgent Deficiencies Act (*The Assigned Car Cases*, 274 U. S. 564 (1927); *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454 (1935); see *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R.*, 258 U. S. 377 (1922)). The Commission here seeks to avoid this normal course of review.

The position taken by the Commission is unusual and it should be prepared to establish that position with unusual force. There are a number of cases in which private parties have sought to establish that action which did not have the form of an order, such as a report, should, because of its substantive effect, be regarded as a reviewable "order" within the meaning of the Urgent Deficiencies Act. So far as we are aware, this is the first case in which a Commis-

* An important fact completely overlooked by the District Court.

sion, being fully cognizant of the alternative methods of expressing its views by means of opinions, reports, press releases, or many other procedures, has drafted an "order" promulgating regulations, and then has come into court to urge that in spite of its studied use of the formal procedure, its action should not be reviewed in the normal manner.

Since in the case at bar it is the Commission that seeks to go behind the face of the Order and to deny its apparent meaning, the Commission must bear the burden of overcoming the presumption that it meant what it did. This burden is particularly onerous in view of the fact that a large number of individual stations subject to the Commission's jurisdiction took what it did at face value and served notices of abrogation of valuable affiliation contracts and refused to enter into new contracts as of the effective date of its Order. Yet its disclaimer of having promulgated *bona fide* regulations is based upon verbalism.

In the court below, the Commission's only answer to the fact that the Order seems plainly reviewable under Section 402(a) was by way of confession and avoidance. Granting all we have said, the Commission urged that the Court should pay no attention to the fact that its Order is in form an order promulgating special regulations nor to the fact that radio stations have acted upon the Order as of its effective date. It objected that because the Order of May 2nd contains the words "no license shall be granted to a standard broadcast station" having certain relationships, rather than the language of the draft regulations, "no licensee of a standard broadcast station shall enter into" such relationships, review under Section 402(a) is no longer availabl

Because of this change in wording, the Commission argued that the regulations are not "in substance" regu-

lations reviewable under Section 402(a) but are regulations which amount to nothing more than an announcement of licensing policy and are reviewable only under Section 402(b) of the Act.

This argument is in reality an attempt to pervert an unimportant matter of form into a crucial matter of substance. Every relevant fact leads to the conclusion that the Commission intended to and did promulgate regulations which both in substance as well as in form are of the type reviewable under Section 402(a).

II

Every substantive characteristic of the Order shows that it is reviewable under Section 402(a) of the Act.

The Investigation

The Commission initiated and conducted its investigation of chain broadcasting upon the basic theory that regulations could be devised which would be equally applicable to all stations engaged in chain broadcasting. The Commission's Order No. 37, which instituted the investigation commenced as follows:

> "WHEREAS, under the provisions of section 303 of the Communications Act of 1934, as amended, 'the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting'; and
>
> "WHEREAS, the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, mul-

> tiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; NOW THEREFORE,
>
> "IT IS ORDERED, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; * * *"

There then followed a list of thirteen specific matters industry-wide in scope to be included in the inquiry with the statement that all other pertinent related matters would be covered (R. 131).

The only reasonable explanation for this industry-wide investigation is that the Commission was interested in the problem on an overall basis and this is significantly illustrated by the fact that, although licensees were asked to give information by questionnaire and some attended the investigation, most of the information desired by the Commission was supplied by the nation-wide network organizations at the request of the Commission.

The inclusive scope of the investigation is fully reflected in the Commission's Report on Chain Broadcasting (R. 37) and the recitals contained in the affidavit of Telford Taylor, Esq., submitted in support of the motion to dismiss the complaint (R. 376).

The Regulations

The draftsmanship of both the tentative and the final regulations is in complete accord with the purpose of the investigation as above stated. The theory of both was

not that any particular station but that all stations engaged in chain broadcasting should no longer have or continue to maintain contracts containing certain specific clauses. There is a single exception which only serves to demonstrate the truth of this fact. Regulation 3.106 provides in part:

> "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, * * * for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. * * *" (R. 128)

This part of regulation 3.106, unlike the rest of the Order, did not purport to set up a specific automatic standard but instead expressly referred to criteria the effect of which could only be determined case by case, with reference to the facts shown in particular cases. It is possible to regard this part of regulation 3.106 as in substance nothing more than a declaration of licensing policy to guide the discretion of the Commission in adjudicating the public interest in specific cases. But none of the other regulations is of the same character nor can they be interpreted to mean what they say if they are to be applied to only one, or several, or any number of stations less than all. None of them leaves room for the exercise of administrative discretion in specific cases. Instead they prescribe specific prohibitions which are automatically operative and can be checked by the clerical staff.

If at the conclusion of its investigation and the completion of its Report the Commission had been unable to reach a final determination and desired to await an investigation into the facts of individual cases before making up its mind, it should have refrained from taking any further action. Its promulgation of regulations was an affirmation that a binding general rule is the appropriate method of dealing with chain broadcasting.

This affirmation had sufficient force to cause radio stations variously situated to act upon it immediately.

Reliance on Section 303(i)

One certain indication that the Commission's determination of policy is final is furnished by the fact that the Commission embodied that policy in regulations promulgated under Section 303(i) of the Act. This was an exercise of the rule-making power, which is legislative in character and consequently may be finally exercised without attention to the facts of particular cases, as distinguished from an exercise of the licensing power conferred by Sections 307 and 309 of the Act which is exercisable only with respect to the facts of individual cases.

From first to last, the Commission has insisted that the Order was made under the rule-making power conferred by Section 303(i) and has argued both in its Report and in its brief in the court below that Section 303(i) contained a grant of substantive power separate and distinct from its licensing power and sufficient to sustain the Order even in default of power based on the Commission's authority to grant or deny licenses. For example, the Commission stated in its Report:

> "If any doubt exist as to the propriety of the regulations viewed as an exercise of the Commission's licensing power, they are completely dispelled

> by section 303(i). This section gives to the Commission the specific power to 'make special regulations applicable to radio stations engaged in chain broadcasting.' *No language could more clearly cover what we are doing here.* * * *" (R. 121.)

And in its brief in the court below, the Commission said (p. 37):

> "The words of Section 303(i) are plain and unambiguous. The regulations here attacked are clearly regulations 'applicable to radio stations engaged in chain broadcasting,' and as such are expressly authorized."

Inclusion of Announcement of Licensing Policy Immaterial

We need not dispute the Commission's insistence that the Order contains an announcement of licensing policy. That is a fact but it is not the significant fact in this case. All of the Commission's regulations dealing with radio are expressive of its licensing policies under the Act, but it is doubtful that even the Commission would contend that none of its regulations is reviewable under Section 402(a) and all must be reviewed under Section 402(b) for that reason alone. The only legitimate reason why review of an announcement of licensing policy should be delayed until the Commission acts in a licensing proceeding is that something remains to be done in that licensing proceeding with respect to the policy itself. If, however, the policy has been so finally determined upon as to take the form of a regulation, there is no reason why it should be reviewable only on appeal from a licensing proceeding.*

* Although judicial review of otherwise final administrative action is sometimes made conditional upon an application for a rehearing, we know of no rule of law requiring the seeking of an amendment after rehearing has been had.

The fact that the administrative process has come to rest with respect to these regulations is demonstrated by the following statements contained in the formal conclusions to the Commission's original Report:

> "The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial.
>
> "We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market" (R. 124).

The Order is Enforceable Apart from License Renewal Proceedings

It is apparent that the regulations promulgated by the Order must be complied with by licensees and are enforceable apart from license renewal proceedings. The Commission itself has insisted that failure to comply with them would justify revocation proceedings. The Commission's power to impose this administrative sanction arises under Section 312(a) of the Act, which provides in part:

> "Any station license may be revoked • • • for violation of or failure to observe • • • any regulation of the Commission authorized by this Act • • •."

The Commission's interpretation of the regulations as justifying the bringing of revocation proceedings under this Section is disclosed by the testimony of Chairman Fly when he appeared for the Commission at hearings before the Senate Committee on Interstate Commerce and stated:

> "Mr. Fly. *You are assuming that a station violates these rules* and makes a 5-year exclusive contract with a network?

"Senator Bone. That is right.

"Mr. Fly. We will assume that. The first thing that happens is that the Commission, following the pattern of the statute, sets in motion administrative procedure. *The Commission issues an order of revocation" (Hearings before Committee on Interstate Commerce on S. Res. 113, 77th Cong., 1st Sess. (1941)*, p. 32).

Again, as recently as in its main brief (p. 11, fn.) before the District Court, the Commission stated:

> "*In the event that the Chain Broadcasting Regulations are not complied with*, the Commission could proceed against licensees either by revocation hearings or by setting their licenses down for hearing on renewal. As indicated in the Commission's Minute of October 31, 1941, the latter procedure will be followed."

The Commission's disclaimer of a present intent to apply this administrative sanction is unimportant. What is important is the interpretation of the substantive meaning of the regulations contained in these statements. The fact that licensees are expected to comply with the regulations, as such, shows beyond any possibility of contradiction that the Commission itself regards them as substantive regulations which can be violated by licensees in such manner as to justify revocation proceedings for such violation.*

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* Violators would also be subject to criminal penalties, since the Communications Act of 1934 imposes criminal sanctions upon persons who willfully disregard regulations of the Commission. Section 502 of that Act provides in part:

> "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offence occurs."

The view that the Commission intended to and did promulgate enforceable regulations to be obeyed by stations as of their effective date is fully supported by internal evidence in the regulations themselves as well as by external evidence consisting of the Commission's own explanation and interpretation of the regulations.

Internal evidence of the mandatory nature of the Commission's regulations is furnished by the amendment to regulation 3.102 which was promulgated on October 11, 1941. Prior to amendment, regulation 3.102 provided:

> "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization."

On October 11, 1941, with the avowed purpose of clarifying the meaning of the foregoing regulation, the Commission added the following sentence thereto:

> "*This regulation shall not be construed to prohibit* any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

With respect to this amendment, the Commission stated in its Supplemental Report (R. 205):

> "This sentence does not change the meaning of Regulation 3.102 but is intended to eliminate con-

fusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area."

It is the plain meaning of this language that in the absence of the conditions set out in the amendment the regulation is to be construed to prohibit agreements of the type described therein.

At no time has the Commission offered a reasonable explanation of why, if its Order constituted nothing more than a bare announcement of policy, the Order distinguished between future and existing contracts, arrangements and understandings and why the effective date of the Order was expressly postponed "with respect to existing contracts, arrangements or understandings." The Commission has equally failed to explain why the effective date of Sections 3.106 and 3.107 of the Order needed to be postponed "in order to permit the orderly disposition of properties" if the Order were nothing more than a simple announcement of licensing policy.

The Commission's meticulous postponements of effective date following the adoption of the original Order of May 2, 1941 are described in the affidavit of Telford Taylor, Esq., submitted by the Commission in support of its motion to dismiss. Thus, it is there stated:

"The effective date of the regulations was deferred for 90 days from the date of the order *with*

respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 *in order to permit the orderly disposition of properties.* On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the effective date of that regulation *in order to permit the orderly disposition of properties.* On July 22, 1941, the effective date of the regulations *with respect to existing contracts, arrangements, or understandings, or network organization station licenses,* or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104" (R. 378).

Further evidence of the Commission's plain intent that its regulations be complied with as regulations, and not as conditional announcements of policy, is found in the testimony given on its behalf before the Senate Committee on Interstate Commerce by Chairman Fly, who characterized the Order in the following language:

> "Mr. Fly: • • • *It is no more a regulation of the freedom of business than a decree of a court.* No one has ever asserted, for example, that a decree of a court, breaking down certain restraints of trade, is in itself a regulation of the business. *Yet this is the very sort of decree that a court charged with the duty of interpreting the antitrust laws by way of equity injunction, would write"* (Hearings, *supra,* p. 68).

The Commission cannot maintain that the foregoing, although made prior to the adoption of the Commission's

"minute", represents a discarded policy. For after the adoption of the "minute" and under a letter of transmittal, dated December 15, 1941, the Commission sent to the Congress its Seventh Annual Report in which the regulations are discussed (pp. 22-23) without any suggestion that they constitute a tentative "announcement of policy." For example, with reference to option time (regulation 3.104), the Seventh Annual Report states:

> "*Under the May 2d regulations, such time options were not permitted.* The October 11th regulations *modified this ban* to permit nonexclusive options during certain hours. Under the regulation as modified, the station may option a certain portion of its available hours * * *. * * * Under both the May 2d and the October 11th regulations, networks *remain free* to purchase as much time outright as they care to use."

Other regulations are discussed in the same way.

Further, even apart from these characterizations of the Order by the Commission itself, under Section 309(b)(1) of the Act, all broadcasting licenses are granted by the Commission with the following condition contained therein:

> "The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience or necessity to the full extent of the privileges herein conferred."

A determination of the public interest by the Commission is a condition precedent to the issuance of any regulations by it. Consequently, the regulations *per se* have the effect of exposing licensees who continue to operate under existing network contracts not only to the hazard of revocation proceedings under Section 312(a) of the Act, authorizing such proceedings "for failure to operate substantially

as set forth in the license", but also to criminal penalties provided in Section 502 of the Act for violation of a "condition" made or imposed by the Commission under the authority of the Act.

The Commission's decision to put its conclusions into an order promulgating definitive regulations, to limit carefully the effective date of its Order and to justify its action under the substantive rule-making authority granted by Section 303(i) of the Act is sufficient, in spite of the words "no license shall be granted", to sustain the validity of the network affiliates' interpretation of the Order as fully operative as of its effective date. The Commission's argument that the phraseology "no license shall be granted" deprives its regulations of meaning or effect until a specific license renewal proceeding arises simply cannot be reconciled with the substantive facts.

One example will illustrate the conflict between the legal argument which the Commission makes for the purposes of this action and the substantive position it takes with respect to the meaning and effect of its Order. At present, radio station licenses are granted for two-year periods. If the regulations amount to nothing more than an announcement of action which the Commission may, or may not, take in a license renewal proceeding, then it would be possible for a licensee to obtain a license for two years upon showing that the terms of its network affiliation contract do not conflict with the regulations, or that it has no contract at all, and, the next day, to enter into a network affiliation contract containing all of the clauses prohibited by the regulations. If the regulations are to be regarded as ineffective except in license renewal proceedings, the Commission would do nothing to compel such licensee to comply with the regulations save to set the license for hearing at the end of the

second year. That this is not the substantive intent of the regulations and that the Commission would issue an order revoking such license is apparent on the face of the record.

The Fact that the Order is Negative in Form and is in Terms Directed to the Commission Does Not Affect Review under Section 402(a).

Prior to the decision in *Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125 (1939), there was a body of law to the effect that an order having negative characteristics might not be reviewable under the Urgent Deficiencies Act and related statutes, but that case finally disposed of the notion that there is anything determinative about the fact that an order may have negative characteristics.

The only significance that remains to the phraseology "no license shall be granted" is the fact that the regulations are in terms directed to the Commission itself rather than to the licensees or to the networks. That this factor is equally lacking in significance was decided in *Powell* v. *United States*, 300 U. S. 276 (1937). In that case the Interstate Commerce Commission issued an order which, like the present Order, was in terms directed solely at the Commission itself. It merely directed that a tariff filed with the Commission by a carrier be stricken from the Commission's files. That order was held reviewable under the Urgent Deficiencies Act upon the ground that under all existing circumstances it in effect directed the carrier not to give the service covered by the tariff. The Supreme Court stated at pages 284-5:

> "The United States and the Interstate Commerce Commission contend that the commission's order is not reviewable under the statute. They do not sug-

gest that the order is a negative one or that the commission did not make an utterance which in form purported to be an order. But they say that it is not directed to any party; it requires no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance 'except as a record of a certain completed act performed by the Commission.'

"But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. By it the commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms. The tariff was a rule binding the Seaboard to furnish transportation to and from the fort for charges under other tariffs applicable to and from the junction. The order would eliminate that rule and substitute for it terms of the tariffs applicable prior to its effective date. In effect the order grants the relief sought by the Central's complaint; it confines the Seaboard's service within the junction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing, transportation to and from Fort Benning. Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute."

Similarly in the instant case the Order of the Commission is in substance and effect directed to the licensees and the networks, and is reviewable as such under Section 402(a). The Commission's disclaimer solely for the purposes of suit should no more be accepted in this case than in the *Powell* case.

III

The Commission's "minute" affords no reasonable basis for substituting Section 402(b) for Section 402(a).

The Commission's Order here in question is an "order" made under Section 303(i) of the Act promulgating definitive regulations applicable to all stations engaged in chain broadcasting and enforceable under the Act by both administrative and statutory sanctions. It was preceded by a legislative investigation extending over a period of three years, on the basis of which the Commission concluded that it was sufficiently informed to make an unconditional determination that the public interest, convenience and necessity required that no station engaged in chain broadcasting maintain a network affiliation contract containing certain specific clauses. It was followed by a rehearing wherein the Commission's lack of power to take this action under Section 303(i) or any other part of the Act was again urged upon the Commission. The only result was an amendment to the Order, equally precise and equally unconditional.

The Order, both in form and in substance, is of the type that is normally reviewable under Section 402(a) of the Act as shown by the forepart of this brief. The only remaining question is whether the "minute" adopted by the Commission after the filing of the present action under Section 402(a) affords a reasonable basis for determining that the possibility of reviewing the Order under Section 402(b) should displace the normal procedure for review under Section 402(a).

In the "minute," the Commission proposes to set for hearing the license of any station which wishes to contest

the validity of the chain broadcasting regulations or the reasonableness of their application to that particular station. Stations are informed that if they engage in such litigation their particular licenses will be temporarily extended during the litigation and that their licenses will be renewed even though they are unsuccessful in such litigation, so long as such stations thereafter conform to the regulations. The Commission also states therein that the adoption of the "minute" is without prejudice to the rights of any person who might petition the Commission for a modification or stay of the chain broadcasting regulations.

It is apparent on the face of the Commission's "minute" that it does not operate to change the form or the substance of the Commission's Order. The regulations are referred to therein as definitive, enforceable regulations. The issues which the "minute" suggests be raised with respect to them are issues appropriate to a test of any binding regulations —their validity, the reasonableness of their application to a particular case, and the question as to whether they should be amended. The "minute" concludes with the reminder that, notwithstanding its adoption, an application to the Commission for a stay of the enforcement of the regulations would be appropriate.

It is equally apparent on the face of the "minute" that the Commission would prefer to have it decided that the possibility of reviewing its Order under Section 402(b) displaces the normal procedure for review under Section 402(a).

It is difficult to see why the Commission feels compelled to take this view. Certainly in the absence of any legal difficulty an action under Section 402(a) is in every way a more practical and efficient method for reviewing the Order of the Commission here in question than an appeal

under Section 402(b) of the Act. The Commission's Order resulted from its legislative investigation into the conduct of chain broadcasting which was industry-wide in scope and was concerned with the contractual and other relations between network organizations and their affiliated stations as a whole, rather than with the circumstances of individual stations or groups of stations. The major portion of the time of this investigation was allotted to the hearing of testimony and the receipt of exhibits submitted by the nation-wide network organizations.

The Commission's Report itself is chiefly devoted to a discussion of existing network organizations and refers to the circumstances of individual stations only in so far as they demonstrate the validity of propositions relating to the conduct of network broadcasting as a whole.

The plaintiffs in the present action brought under Section 402(a) consist of NBC, one of the three nation-wide network organizations (at the time suit was brought), and the owners of two of its affiliated stations, Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company. In a companion case, also brought under Section 402(a), the Commission's Order is attacked by Columbia Broadcasting System, Inc., the second of these three nation-wide network organizations. Mutual Broadcasting System, Inc., the third, has intervened on the side of the defendants in both cases.

The present action is ideally fitted for the determination of the issues relating to the power of the Commission to make its Order, which relate not to the special circumstances of one or more individual stations, but to the conduct of network broadcasting on a nation-wide basis.

Review Under Section 402(b) Is Not Appropriate for the Issues

If the Commission itself found licensing proceedings an inappropriate procedure for the formulation and promulgation of regulations, or "policies," affecting the industry as a whole, it seems reasonable to suppose that such licensing proceedings will be equally inappropriate for the review of such regulations or "policies."

Licensing proceedings are focused upon the question whether a particular license application should be granted on the basis of the facts relating to the individual application. The original parties in such a proceeding would consist only of the station applying for a renewal of its license and the Commission. Even assuming that NBC as a network organization and interested stations are permitted to intervene in a specific licensing proceeding,* the

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* The Commission takes the position that no one has a *right* to intervene in such a proceeding and that intervention will be allowed only "to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions." Thus, in *In Re Matheson Radio Co., Inc.*, Pike & Fischer Admin. Law, §41g.23-1 (May 21, 1941), the Commission relied upon the following interpretation of Regulation 1.102 as quoted from one of its earlier decisions:

> "'The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. * * * The fact that a proposed intervenor may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application. * * * By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the

primary issue would be the disposition which should be made by the Commission of the individual application. Infinite possibilities of a multiplicity of suits are presented by the necessity of resorting to that procedure.

In a number of licensing proceedings the Commission may be compelled to base its decision denying a particular license application upon the facts of the individual case apart from the Order. On an appeal from this decision under Section 402(b) the question of the Commission's power to make the Order would not be relevant.

If the Commission bases its decision partly upon the particular facts of the individual case apart from the Order and partly upon a violation of the Order, there is still no assurance that the appellate court in an appeal under Section 402(b) will review that part of the Commission's decision relating to the Order.

Even should the Commission decide solely upon the basis of the Order, the remedy by appeal under 402(b) is inadequate so long as the decision is based upon the application of the Order to the particular licensee. NBC would have to take an appeal from each separate license proceeding in order to protect the network, and even should it ultimately succeed, the network would be irretrievably destroyed long before the series of appeals under Section 402(b) had been completed, because of the continuing effectiveness of the Order as to all other affiliates not currently embroiled in litigation. The adequacy of that remedy depends upon the willingness of every affiliate to litigate the validity of the Commission's regulations in licensing

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public will benefit through aid or assistance given to the Commission or the applicant by a party-intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102.'"

proceedings in spite of the attendant trouble, risk and expense.*

Under Section 309(a) of the Act the Commission is authorized to *grant* licenses without a hearing. If stations conform their contracts to the terms of the Commission's regulations in advance of application for license renewals and thereafter obtain such renewals from the Commission without hearing, the sole ground upon which NBC could apply to the Court of Appeals for the District of Columbia would be that it was a party aggrieved by the granting of the license. The obvious answer to an appeal of this character would be that the injury complained of resulted not from the granting of the license, but from the act of the station in conforming to the Commission's requirements, leading to the inevitable dismissal of the appeal. Exactly the same situation exists with respect to a station which has no affiliation contract.

It is true that a case may be postulated in which issues relating solely to the Commission's rule-making power might arise in a licensing proceeding. Such a case would be one where the Commission gave, as its sole ground for denying a license, the fact that the licensee had been guilty of a violation of the substantive rules contained in the Chain Broadcasting Regulations. Even in that case the network would be subject to irreparable injury pending the proceeding. This is so because the "minute" does not suspend the regulations but only gives immunity to par-

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* Since the networks, as such, are not licensed by the Commission they cannot themselves institute license renewal proceedings. Although individual stations operated by the networks are licensed by the Commission, such stations (being directly operated) have no affiliation contracts and hence the networks cannot in license renewal proceedings with respect to those stations test the validity of the regulations relating to affiliation contracts.

ticular litigants. Again, those stations unwilling to bear the trouble, risk and expense of a license renewal proceeding would conform their contracts to the regulations and be lost to the network.

Moreover, no better case could be suggested to demonstrate the falseness of the issue which is raised by referring to the possible identity of the questions which might arise in an action under Section 402(a) and an appeal under Section 402(b). If the regulations constitute such an exercise of the rule-making power that violation thereof by the licensee would justify the Commission in denying a license on that ground alone, then such a violation on or after the effective date of the Order would expose such licensee to all of the administrative and statutory sanctions surrounding such substantive exercises of the Commission's rule-making power. The very action which the Commission would take in the licensing proceeding would demonstrate beyond question the character of its Order as an "order" within the meaning of Section 402(a) against which Congress has given a right of action under that section irrespective of any other methods of review which might exist.

Consequently, every practical consideration relating to the efficiency and completeness of the remedy to be afforded leads to the conclusion that the proper procedure in this case is that provided by Section 402(a) of the Act.

There Is No Policy Requiring Review Under Section 402(b)

It may be admitted that these practical considerations might not be controlling were there some overriding reason of policy requiring that the Order be reviewed in

individual license proceedings rather than by plenary suit under Section 402(a).

For example, when the Public Utility Holding Company Act was passed, the Securities and Exchange Commission sought, for compelling reasons of policy, to control the mass of expected litigation raising the constitutionality of the Act. The SEC would have been a defendant in all cases brought by private parties, and if all suits were allowed to progress at the same time it would have been the defendant in a multiplicity of suits. Therefore the SEC sought to stay all suits pending a decision on a case chosen by it. Moreover, the governing provisions of that Act were extremely general in character and it was important that the facts of the test case fill in the legislative outline in a reasonable manner. Therefore an attempt to control a test of the constitutionality of that Act on the part of the Government could be justified on the ground that such control was necessary to present a case possessing the proper factual background which would enable the courts more fairly to pass upon the constitutional questions involved as well as to avoid a multiplicity of suits.

There are no comparable reasons of policy in the present case. The regulations of the Commission here in question are definite and precise, they apply to chain broadcasting as a whole and nothing can be gained by an examination of the facts relating to a particular station's license application. It is 402(b) that may raise a multiplicity of suits and 402(a) that will avoid them.

The difference between the means adopted by the Securities and Exchange Commission to control the path of litigation with respect to the Public Utility Holding Company Act and the action taken by the Commission in this case is also instructive. There the Government sought to assure

all parties subject to the Act that they would not be exposed to its provisions pending the determination of the test case which had been chosen by the Government. The procedure there adopted was described by this Court in *Landis, et al.* v. *North American Co.*, 299 U. S. 248 (1936), at pages 251-252, as follows:

> "Upon the argument of the motion the Attorney General and the Securities and Exchange Commission announced that until the validity of the Act had been determined by this court in a civil suit which would be diligently prosecuted, neither the Attorney General nor the Commission would seek to enforce the criminal penalties of the Act, and that even after such determination they would not seek to exact penalties for earlier offenses. Written notice to that effect was given to all prosecuting officers. At the same time the Postmaster General announced that even if he had authority, he would not exclude any company from using the mails because of any violation of the Act pending the judicial determination of its validity by this court. Also, the Commission issued a regulation permitting a holding company, when registering, to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be adjudged invalid or ineffective. Finally, the Attorney General offered to submit to a temporary injunction restraining the enforcement of the Act until the Electric Bond and Share case should be determined by this court. On the other side, the plaintiffs offered to consolidate their cases and thus dispose of them as one. They also offered, as we were informed upon the argument, to select a group of suits, not more than three or four, to be tried at the same time, with the understanding that any others would then be held in abeyance. These offers were rejected, and the Government stood upon its motion."

In the *Landis* case there were compelling reasons of policy for controlling the course of review and the procedure adopted was directed solely toward that end.

Even though it could be assumed in the present case that the Commission is impelled by some reason of policy to avoid review under Section 402(a), the procedure it has adopted is not directed solely to that end. Its attorneys conceded in open court at the hearing on appellants' application for temporary relief pending appeal that it had expressly refused to grant a stay of the enforcement of its regulations pending a determination of its power in a test licensing proceeding and appeal therefrom under Section 402(b).

The difference between the protection afforded in the *Landis* case and that afforded appellants by the Commission's procedure in the present case cannot be bridged by the legal arguments of the Commission's counsel to the effect that its Order should be regarded as having no substantive effect. The Commission itself has been publicly announcing the contrary with such force and effect that appellants have already suffered serious injury. Nor can the Commission expect that its "minute" with its limited and special immunity be considered the equivalent of the complete waiver of enforcement made in the *Landis* case.

The Commission may be entitled to control its own procedure, but something more is involved in the present case than a battle of wits. The Commission is an administrative body charged with the regulation of radio broadcasting in the public interest, convenience and necessity. It cannot regard cancellations of network affiliation contracts and imminent danger to the conduct of nation-wide network broadcasting service with the equanimity indicated by its argument in the court below that these consequences of the Order should be regarded as immaterial.

The Commission has failed to show reasons either of practicality or of policy for its desire that its Order be tested only under Section 402(b) of the Act. Failing such reasons, and in the face of the conceded effect of its Order, it is apparent that the Commission seeks something more than orderly review. It wants the immediate obedience to its regulations which has resulted and will continue to result from the fact that the regulations are, both in form and in substance, definitive, enforceable regulations.

Conclusion

For these reasons, it is respectfully submitted that the decision of the District Court should be reversed and the cause remanded to that Court for consideration of the merits.

Respectfully submitted,

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DAVID M. WOOD,
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APPENDIX A.

The Urgent Deficiencies Act.

(38 Stat. 219, 220; 28 U. S. C. Sections 41(28), 43 through 48, inclusive.)

SECTION 41. The district courts shall have original jurisdiction as follows:

* * * * * * *

(28) Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 43. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

§ 44. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set

aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States.

§ 45. The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need by filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court.

§ 45a. The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this Title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided, further,* That communities, associations, corporation, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney-General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said

intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

§ 46. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

§ 47. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would other-

wise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

§ 47a. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general

of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

§ 48. All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made party, public interests are involved.

The Communications Act of 1934.

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of

Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon,

and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant and/or other interested parties intervening in said appeal, but not

against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

SEC. 4 • • •

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • • • • • •

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

• • • • • • •

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

• • • • • • •

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any

regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

APPENDIX B

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Commission Order in Docket No. 5060.

In the Matter of the Investigation of Chain Broadcasting
May 2, 1941

WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity;"

WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

3.101 No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

standing, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: Provided, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

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[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

3.105 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106 No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107 No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108 No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

[2] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

standing, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,

T. J. Slowie, *Secretary*.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C.

October 11, 1941

Order.

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

IT IS ORDERED, That the Commission's order of May 2 1941, entered in Docket No. 5060, BE, AND THE SAME IS HEREBY, AMENDED in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first

call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options[1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours[2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder

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[1] As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

T. J. SLOWIE,
Secretary.